COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2014-SC-000108

JERRY JAMGOTCHIAN — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HON. PHILLIP J. SHEPHERD
CASE NO. 11-CI-1047

COURT OF APPEALS CASE NO. 2012-CA-002154

KENTUCKY HORSE RACING COMMISSION, et al. — APPELLEES

BRIEF OF APPELLEES KENTUCKY HORSE RACING COMMISSION, JOHN T. WARD, ROBERT M. BECK, AND TRACY FARMER IN THEIR OFFICIAL CAPACITIES

Respectfully submitted,

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CERTIFICATE PURSUANT TO CIVIL RULE 76.12(6)

The undersigned certifies that a true and accurate copy of the BRIEF OF APPELLEES was served upon each of the following via U.S. mail, postage prepaid, this 13th day of March 2015: i) Richard A. Getty and Kristopher D. Collman, The Getty Law Group, PLLC, 1900 Lexington Financial Center, 250 West Main Street, Lexington, KY 40507; ii) Honorable Phillip Shepherd, Judge, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601; iii) Sally Jump, Franklin Circuit Court Clerk, 222 St. Clair Street, Frankfort, KY 40601; iv) Samuel P. Givens, Jr., Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The undersigned further certifies that the record on appeal was not withdrawn after the Court of Appeals' opinion was issued.

Monica H. Braun

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STATEMENT CONCERNING ORAL ARGUMENT

While the regulation of thoroughbred horse racing is a matter of great importance to Kentucky, the issue in this case is a straightforward question of constitutional law that the United States Supreme Court has recently addressed. For this reason, the Appellees do not believe oral argument is necessary.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Few, if any, economic activities are as pervasively regulated by the Commonwealth of Kentucky as the racing of thoroughbred horses and the wagering thereon. The plenary regulation of the Commonwealth's signature industry, which began as early as 1894, is presently administered by Appellee Kentucky Horse Racing Commission ("KHRC"), an agency vested with the power to "regulate the conduct of horse racing," which includes "jurisdiction and supervision over all horse race meetings." See Kentucky Statutes, Barbour & Carroll, Ch. 36, §§ 1326-1330 (1894); KRS 230.225(1), KRS 230.260(1).

In carrying out its statutory duties, KHRC has "full authority to prescribe necessary and reasonable administrative regulations and conditions under which horse racing at a horse race meeting shall be conducted." KRS 230.260(8). These regulations govern every aspect of horse racing, from establishing the latest minute in a day that a race can begin to requiring that a jockey's buttons be fastened. 810 KAR 1:016, Section 1; 810 KAR 1:009, Section 14(1). KHRC has thirty-six separate regulations – with hundreds of sections and thousands of subsections – that pertain solely to thoroughbred racing, including laws that regulate owners, trainers, jockeys, apprentices, pari-mutuel wagering, medications, testing procedures, and the running of the race. See 810 KAR, Chapter 1. Cumulatively, KHRC sets forth the permissible and prohibited acts for each participant and closely controls the manner in which the race is run, including post-race testing and sampling. Id. KHRC stewards are present at all race meetings to interpret and enforce these laws. KRS 230.240(1); 810 KAR 1:004, Section 3(4). The duration and breadth of this governance leaves no doubt that the regulation of horse racing is a traditional government function in our Commonwealth.

One of the activities KHRC regulates is claiming races, which are races in which horses may be purchased for an entered price. 810 KAR 1:015, Section 1. Among these laws is the regulation at issue in this proceeding, which provides:

> (a) A horse claimed in a claiming race shall not be sold or transferred, wholly or in part, within thirty (30) days after the day it was claimed, except in another claiming race.
>
> (b) Unless the stewards grant permission for a claimed horse to enter and start at an overlapping or conflicting meeting in Kentucky, a horse shall not race elsewhere until the close of entries of the meeting at which it was claimed.

810 KAR 1:015, Section 1(6) ("Regulation"). A person cannot claim a thoroughbred horse in a claiming race unless he or she is licensed by KHRC.[1] Id. at 1(1) and (2). The effect of the Regulation is that a licensee who is granted the privilege of claiming a thoroughbred horse during a Kentucky race meet agrees not to race the claimed horse elsewhere until the end of the meet at which the horse was claimed.[2] Vol. I., R. 108. This prevents the uncontrolled transfer of horses from the Commonwealth to help maintain a sufficient number of horses to fill races. Vol. I, R. 128. The Regulation only applies to horses purchased in claiming races and has no applicability to the private sale of thoroughbreds. Vol. II, R. 264.

The Appellant, Jerry Jamgotchian ("Jamgotchian"), who was a licensee at the relevant times, claimed the horse Rochitta during Churchill Downs' ("Churchill") Spring Meet on May 21, 2011 for $40,000.00. Vol. I., R. 108. Churchill's Spring Meet ran from April 30 to July 4, 2011. Id. Pursuant to the Regulation, Jamgotchian was not permitted to race Rochitta at another race track until the close of entries for Churchill's

[1] Alternatively, an agent of a licensed person, or a person in the process of becoming licensed, can purchase horses in claiming races. Id. at Section 1(1)-(2).
[2] The stewards, however, can grant permission for a claimed horse to enter and start at an overlapping or conflicting meeting in Kentucky. 810 KAR 1:015, Section 1(6)(b).

Spring Meet on July 1, 2011. Id. Nevertheless, on or about May 31, 2011, Jamgotchian sought to enter Rochitta in a June 4, 2011 race at Penn National Race Course in Pennsylvania. Id. at 108-09. Rochitta's entry was refused because a Penn National representative was aware of the Regulation and learned that Rochitta had been claimed at Churchill's Spring Meet. Id. at 109.

On June 3, 2011, Jamgotchian faxed a nomination form for Rochitta to run in the Lyphard Stakes at Penn National on June 14, 2011. Id. While accepted for entry, Rochitta was placed on the "also eligible" list because the race was oversubscribed. Id. Because of the weather conditions on race day, the race was taken off the turf and scratches reduced the field to six. Id. Rochitta had the opportunity to run in the race; however, neither Jamgotchian nor his trainer notified the stewards at Penn National of their intention to run, which caused Rochitta to be scratched in accordance with track policy. Id.

Shortly after the Lyphard Stakes, Jamgotchian entered Rochitta in three races at Penn National in June 2011. Id. at 108-10. Rochitta's entry in each race was accepted with the understanding that Jamgotchian might be in violation of the Regulation. Id. None of the races took place, however, as each failed to field an adequate number of horses. Id. No one affiliated with KHRC ever requested that Penn National refuse to accept Rochitta's entry in any of the aforementioned races. Id. at 110. Jamgotchian also claims to have tried to enter Rochitta in at least two races in June 2011 at Presque Isle Downs in Erie, Pennsylvania prior to the end of Churchill's 2011 Spring Meet. Id. For reasons unknown to KHRC, Rochitta did not run in either of these races. Id. As in all of the aforementioned races at Penn National, no one affiliated with KHRC ever requested

that Presque Isle Downs refuse to accept Rochitta's entry or otherwise prohibited her from running. In fact, Kentucky's Chief State Steward was contacted by the racing secretary at Presque Isle, but he said nothing to the racing secretary about whether the entry should be accepted and never requested that Presque Isle honor the Regulation. Id. Indeed, Jamgotchian has never been charged with violating the Regulation. Id.

Less than two weeks after Churchill's Spring Meet closed, Jamgotchian filed a complaint in the Franklin Circuit Court against KHRC,[3] alleging that the Regulation violates the Commerce Clause and Equal Protection Clause of the United States Constitution, and seeking injunctive relief against KHRC because of these alleged violations and under the Civil Rights Act, 42 U.S.C. § 1983.[4] Id. On October 10, 2011, Jamgotchian filed a motion for summary judgment. Id. at 110-11. On November 10, 2011, KHRC filed a cross motion for summary judgment, which was granted on November 29, 2012 ("Order"), dismissing all of Jamgotchian's claims. Vol. I, R. 106; Vol. II, R. 256-66.

Jamgotchian appealed the dismissal of his claims to the Kentucky Court of Appeals. On February 7, 2014, the Court of Appeals issued an opinion ("Opinion") affirming the Order.[5] The Court of Appeals found that the Regulation was constitutional because "[f]or more than 100 years, both statutory and case law have established that the

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[3] Jamgotchian originally sued Lisa E. Underwood, in her official capacity as Executive Director of the KHRC, Robert M. Beck, Jr., in his official capacity as Chairman of the KHRC, and Tracy Farmer, in his official capacity as Vice-Chair of the KHRC. On July 26, 2011, Jamgotchian voluntarily dismissed these individuals from the lawsuit. Vol. II, R. 197-98. On January 5, 2012, at Jamgotchian's request, the voluntary dismissal was set aside and Marc Guilfol (who acted as Interim Executive Director of KHRC after Underwood resigned), Robert M. Beck, Jr. and Tracy Farmer were again named as defendants in their official capacities. Vol. II, R. 200. Jamgotchian later substituted John T. Ward for defendant Guilfol, after Ward was named Executive Director of KHRC. Because all three defendants were sued in their official capacities, this brief is filed on behalf of all of the defendant appellees. Vol. II, R. 267-68.

[4] Jamgotchian did not address the Equal Protection Clause argument or injunctive relief claim pursuant to the Civil Rights Act in the Court of Appeals proceeding or in his Motion for Discretionary Review

[5] A copy of the Opinion was attached as item B in Jamgotchian's Brief.

state has a unique and far-reaching role in the regulation of this sphere of economic activity." Opinion at 7. Because the "Regulation treats all private actors—both Kentucky resident licensees and out-of-state licensees—exactly the same," the Court of Appeals found that the Regulation was not discriminatory and therefore constitutional. Id. at 11. Jamgotchian moved for discretionary review of the Opinion, which gave rise to the present appeal.

ARGUMENT

I. The Regulation Does Not Violate the Commerce Clause of the United States Constitution.

The Kentucky Court of Appeals and Franklin Circuit Court correctly held that the Regulation does not violate the Commerce Clause of the United States Constitution. This result is compelled by the United States Supreme Court's decision in Department of Revenue of Kentucky v. Davis, 553 U.S. 328 (2008), which addressed and refined the current state of the "dormant" Commerce Clause in a case arising from Kentucky's courts. Under Davis, states are permitted to enact laws, such as the Regulation, to carry out traditional government functions. The Regulation, which is an important component of KHRC's comprehensive regulatory scheme, helps ensure adequate fields for claiming races by preventing the uncontrolled transfer of horses from the Commonwealth during the meet in which the horse is claimed. Vol. I, R. 128. The need for the Regulation is demonstrated by the facts of this case; several of the races Rochitta entered in Pennsylvania did not run due to a failure to attract an adequate number of horses. Id. at 108-10. The benefits that inure to the Commonwealth through the continued vitality of our signature industry include increased tax revenues, higher purses, and higher wages. In helping ensure that the racing industry remains competitive, the Regulation applies

even-handedly to all persons who purchase a horse in a claiming race regardless of whether they are a Kentucky resident or not.

In reviewing the Order and Opinion granting and affirming summary judgment, this Court is to determine "whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc., 90 S.W.3d 46, 49 (Ky. 2002). The Franklin Circuit Court, as reflected in its Order, thoroughly examined the Regulation under the analytic framework the United States Supreme Court prescribed in Davis. The Court of Appeals, as shown in its Opinion, likewise considered and applied the controlling precedent.

A. *The "Dormant" Commerce Clause and Its Questioned Viability*

The Commerce Clause of the United States Constitution provides that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. Art I, § 8 cl. 3. From this grant of authority, the United States Supreme Court judicially developed what is commonly referred to as the "dormant" Commerce Clause, which imposes certain implicit limitations on the ability of states to burden the flow of interstate commerce. McBurney v. Young, 133 S. Ct. 1709, 1719 (2013). The viability of the judicially-created "dormant" Commerce Clause is now in question. For example, in an April 2013 Opinion the Supreme Court observed that the "Commerce Clause does not expressly impose any constraints" on the states and several members of the court have expressed the view that it does not do so, describing the "dormant" Commerce Clause as an "unjustified judicial intervention" that "has no basis in the Constitution and has proved unworkable in

practice." Id. The erosion of the "dormant" Commerce Clause is further evidenced by the fact that in the last decade, the United States Supreme Court has decided seven cases involving the "dormant" Commerce Clause and upheld the constitutionality of the challenged laws in all but one of the cases.[6]

The crux of inquiry when a law, such as the Regulation, is alleged to have violated the "dormant" Commerce Clause is whether the challenged law is a protectionist measure, or "whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." McBurney, 133 S. Ct. at 1719-20, citing Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Starting from this basic premise, the United States Supreme Court imposes different standards for evaluating whether a law is protectionist in nature, or whether it pertains to a legitimate local concern, depending upon whether the challenged law pertains to a traditional government function. Davis, 553 U.S. at 341.

B. *The Three-Step "Traditional Government Function" Framework Required by United Haulers and Davis*

In United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007), and Department of Revenue of Kentucky v. Davis, 553 U.S. 328 (2008) the Supreme Court set forth a three-step framework courts must follow when considering if a state law runs afoul of the "dormant" Commerce Clause. First, a court is to first consider whether the challenged law concerns a traditional government function because such laws warrant different treatment "from

[6] See Tarrant Regional Water District v. Hermann, 133 S. Ct. 2120 (2013); McBurney v. Young, 133 S. Ct. 1709 (2013); Levin v. Commerce Energy, Inc., 560 U.S. 413 (2010); Dept. of Revenue of Ky. v. Davis, 553 U.S. 328 (2008); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007); American Trucking Associations, Inc. v. USF Holland, Inc., 545 U.S. 429 (2005); Granholm v. Heald, 544 U.S. 460 (2005).

laws favoring particular private businesses over their competitors." United Haulers, 550 U.S. at 342; see also Davis, 553 U.S. at 339-43. Second, a court must determine whether the law discriminates against interstate commerce. Davis, 553 U.S. at 338-39 (citations omitted). If a law is discriminatory, it will "survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" Id. Finally, if the law is not discriminatory, a court is to determine whether the law's burden on interstate commerce clearly exceeds the law's local benefits. Id.

In United Haulers, the issue was whether two counties' ordinances, which required all waste haulers to bring waste to a state-owned-and-operated facility, violated the Commerce Clause. 550 U.S. at 334. In determining whether the ordinances were discriminatory, the Supreme Court first noted that waste disposal is a traditional government-regulated activity, and this justified treating the ordinances, which favor local government, differently under the Commerce Clause than laws that simply favor a private entity. See id. at 344. Because "[w]aste disposal is both typically and traditionally a local government function," the court then moved to the second step in the analysis to determine whether the ordinances are discriminatory. The court held that the ordinances, which address traditional government concerns, are exercises of police power designed to protect "the health, safety, and welfare of its citizens." Id. at 342, 344.

The Court made clear that in assessing whether a law is discriminatory, it is important to consider if in-state and out-of-state actors are treated similarly under the law. Id. at 345 (citations omitted). The Court therefore ruled that the ordinances do not discriminate against interstate commerce because the ordinances treat private companies

subject to the laws (in-state waste haulers and out-of-state waste haulers) exactly the same. Id.

Because the ordinances were nondiscriminatory, the Court then moved to the final step of the three-part framework to determine whether the ordinances' burden on interstate commerce clearly exceeded the ordinances' local benefits. See id. at 346. Because the evidence did not establish that the ordinances' incidental burden on interstate commerce exceeded the ordinances' public health and environmental benefits, including revenue generation and increased recycling, the ordinances were constitutional under the "dormant" Commerce Clause. See id.

In Davis, the Supreme Court expanded the protection of state regulation to Commerce Clause challenges even further. The issue was whether Kentucky's income tax structure, which exempts interest on bonds issued by Kentucky or its subdivisions from income tax while taxing income on bonds issued by other states, violates the Commerce Clause. See Davis, 553 U.S. at 331-35. The circuit court found the law constitutional, but the Kentucky Court of Appeals reversed based upon its interpretation of prior Supreme Court precedent. Id. at 336-37. This Court denied the Dept. of Revenue's motion for discretionary review. Id. The Supreme Court granted certiorari because the Court of Appeals' decision "casts constitutional doubt on a tax regime adopted by a majority of the States." Id. at 337.

Relying upon United Haulers in determining whether Kentucky's tax structure was discriminatory, the Supreme Court stated that "a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause

abhors." Id. at 341. The Supreme Court recognized that proceeds from municipal bonds enable Kentucky to promote its police power by protecting the health, safety, and welfare of its citizens through public revenue generation. Id. at 341-42. The Supreme Court further recognized that 41 states believe their public interests are likewise served by having the same tax-and-exemption structure as Kentucky. Id. at 335, 342. As stated by the Court, "this emphasis on the public character of the enterprise supported by the tax preference is just a step in addressing a fundamental element of dormant Commerce Clause jurisprudence, the principle that 'any notion of discrimination assumes a comparison of substantially similar entities.'" Id. at 342-43 (citations omitted). The Supreme Court held that Kentucky's tax structure was not discriminatory. Id. at 343.

Although the Supreme Court in Davis acknowledged that Kentucky's tax law could be invalidated under Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), which explained that a state law having only "incidental" effects on interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," the court nevertheless refused to apply the Pike test to Kentucky's tax structure. Id. at 353. The Court stated that "the current record and scholarly material convince us that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary ... to satisfy a Pike burden in this particular case." Id. The Court suggested that the Kentucky legislature was better suited to balance the Pike considerations. Id. at 356.

C. *The Regulation Is Part of a Comprehensive Program for the Regulation of Thoroughbred Horse Racing, Which Is a Traditional Government Function*

In accordance with United Haulers and Davis, the first step in considering whether the Regulation is constitutional with respect to the Commerce Clause is to

determine if the law is part of a traditional government function. Id. at 342-43 (referring to United Haulers' reliance on the traditional government function analysis). The regulation of horse racing in the Commonwealth, of which the Regulation is a component, is a traditional government function for several reasons. First, the regulation of horse racing in Kentucky, and elsewhere, has been a longstanding focus of the legislature. In fact, Kentucky first began regulating horse racing in 1894, or ***121 years ago*** - directly akin to the Davis court's characterization of a bond issuance process as a "century-old" practice. See Kentucky Statutes, Barbour & Carroll, Ch. 36, §§ 1326-1330 (1894); Davis, 553 U.S. at 342-43. Horse racing has been pervasively regulated for so long because it is critical that the public maintain confidence in the integrity of thoroughbred racing. This requires the Commission to comprehensively monitor and regulate the integrity of each race, as well as the wagering thereon, in order to attract and retain patrons. Without public confidence, the industry cannot remain healthy. Likewise, without adequate fields of horses on which patrons can wager, the industry cannot remain healthy. The Regulation therefore plays an important role by helping make sure the scheduled races actually occur, which results in more races, more wagering, higher purses, and employment of jockeys, trainers, and track personnel – all of which generate tax revenues and stimulate the economy in the Commonwealth. This benefits in-state and out-of-state persons alike; for example, Jamgotchian could not have purchased Rochitta absent a viable claiming system.

Second and relatedly, the Regulation is an exercise of the state's police power regarding the public health, safety, and welfare of the Commonwealth and its citizens. The Kentucky legislature has created a comprehensive regulatory scheme for horse

racing, acting principally through KHRC, which is part of the Public Protection Cabinet. See KRS 230.260. The regulation of horse racing is a valid exercise of the state's police power, as acknowledged in KRS 230.215:

> (1) It is the policy of the Commonwealth of Kentucky, in furtherance of its responsibility to foster and to encourage legitimate occupations and industries in the Commonwealth and ***to promote and to conserve the public health, safety, and welfare***, and it is hereby declared the intent of the Commonwealth ***to foster and to encourage the horse breeding industry within the Commonwealth and to encourage the improvement of the breeds of horses.*** (...)
>
> (2) It is hereby declared the purpose and intent of this chapter ***in the interest of the public health, safety, and welfare, to vest in the racing commission forceful control of horse racing in the Commonwealth with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon*** is conducted in the Commonwealth so as to encourage the improvement of the breeds of horses in the Commonwealth, to regulate and maintain horse racing at horse race meetings in the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and to regulate and maintain horse racing at race meetings in the Commonwealth so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth. (...)

(Emphasis added). KHRC has statutory authority to provide the opportunity for races within the Commonwealth to be competitive, which is an obvious prerequisite to a healthy racing industry. The Regulation is a vital component of the legislature's statutory aim.

Moreover, this Court has recognized that KHRC "was properly invested by the legislature with authority ***under the police powers of the state*** to make and enforce rules for the conduct of horse racing in Kentucky, ***including claiming races***." Bobinchuck v. Levitch, 380 S.W.2d 233, 236 (Ky. 1964) (emphasis added). Just as the Davis court recognized that Kentucky's tax structure enables Kentucky to promote its police power

by protecting the health, safety, and welfare of its citizens, the Regulation, as part of the regulatory scheme created by the legislature and carried out by KHRC, is expressly an exercise of the state's police power with respect to the public health, safety, and welfare in claiming races. Davis, 553 U.S. at 341-42. This is established by the express language of the governing statutes and recognized by this Court. To find that the regulation of horse racing, and sales at such races, is ***not*** a traditional government function with respect to the Commonwealth's police power in promoting health, safety, and welfare would require this Court to ignore the legislature's unequivocal statements to the contrary.

Third, the regulation of horse racing – including the regulation of claiming races – is pervasive across the United States. ***Out of the 38 states that permit wagering on horse racing, 27 states have a claiming law similar to Kentucky's Regulation.***[7] In Davis, the

[7] See **Arizona** – A.A.C. R19-2-115 G(2): the claimant "[s]hall ensure the claimed horse does not race outside of Arizona until the race meet at which the horse was claimed is closed or for 60 days from the day of claim, whichever is less, ..."; **Arkansas** – Arkansas Racing Commission Rule 2458: "... no horse claimed during an Oaklawn race meet shall be eligible to race at another track for a period of thirty (30) days following the end of the Oaklawn racing season unless the claimed horse has subsequently run back in another race at Oaklawn following the claim."; **Colorado** – 1 CCR 208-1-8:118: "A claimed horse shall not race elsewhere for a period of thirty (30) days or until after the close of the meet, whichever comes first..."; **Delaware** – Del. Code Ann. tit. 3 § 13.6.1: "A horse claimed by an Owner that has started a horse at the current meet and by a Trainer that is currently stabled on the grounds of the Association, shall not be permitted to run in another racing jurisdiction for the period of sixty (60) days, beginning the day after the claim was made, or until the end of the current meet, whichever comes first. A horse that is claimed by an Owner that has started a horse at the current meet by a Trainer that is not currently stabled on the grounds of the Association shall not be permitted to race elsewhere until the close of the meeting which it was claimed. ..."; **Idaho** – I.D.A.P.A. 11.04.09.035: "No horse which has been claimed out of a claiming race is eligible to race at any other race meeting in this state or elsewhere until the close of the meeting where it was claimed, ..."; **Illinois** – 11 Ill. Adm.Code § 510.200(a)-(c): "A thoroughbred horse claimed out of a claiming race is not eligible to race in any state other than Illinois for a period of 45 days from the date of the claim or until the racing season has concluded."; **Indiana** – 71 IAC 6.5-1-4(g): "A horse claimed in this jurisdiction shall not race outside Indiana until after the conclusion of the race meet ..."; **Iowa** – 491 IAC 10.6(18)(f)(3): "A horse that was claimed under these rules may not participate at a race meeting other than that at which it was claimed until the end of the meeting, ..."; **Louisiana** –LAC 35-9909: "However, a horse claimed at a track in Louisiana must remain at the track where it was claimed for a period of 60 calendar days or until the current meeting at which it was claimed is terminated."; **Maryland** – COMAR 09.10.01.07M(4): "If a horse is claimed...[i]t may not race outside of Maryland for a period of 60 days from the day of the claim ..."; **Massachusetts** – 205 CMR 4.06(5): "A claimed horse shall not race elsewhere until after the close of the meeting at which it was claimed or until 60 calendar days the day after the claim, whichever comes first."; **Michigan** – MCL 431.3205(3): "A claimed horse is not eligible to race in any state other than Michigan for a period of 60 days from the date of claim or until after the

Supreme Court placed importance on the fact that most states had a tax law similar to Kentucky's in determining that Kentucky's law served a traditional public function. Davis, 553 U.S. at 335, 342. That other states acted similarly was evidence of the traditional government function of the laws at issue. In fact, the Supreme Court stated it granted certiorari because the Kentucky Court of Appeals' decision cast doubt on a regime employed by a majority of the states. Id. at 337. The Regulation, which is part of a larger comprehensive regulatory scheme employed by a majority of states permitting horse racing, therefore constitutes a traditional government function because it directly satisfies ***every*** factor utilized in Davis.

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close of the meeting at which it was claimed."; **Minnesota** – Minn. R. 7883.0140, subp. 22: "No claimed horse shall race at any other racetrack until after the close of the race meeting at which it was claimed, or for 60 days, whichever is shorter, ..."; **Montana** – Rule 32.28.804(6), ARM: "A claimed horse shall not race elsewhere until after the close of the meeting at which it was claimed ..."; **Nebraska** – 294 Neb. Admin. Code, ch. 15, § 007.05: "A horse claimed at a Nebraska track shall not be permitted to race at a track outside of Nebraska until after the close of the meeting at which it was claimed, ..."; **Nevada** – NAC 30.335(7): "No horse which has been claimed out of a claiming race shall be eligible to race at any other race meeting in this state or elsewhere until the close of the meeting where it was claimed ..."; **New Jersey** – N.J.A.C. 13:70-12.5: "A claimed horse shall not race elsewhere until after the close of the meeting at which it was claimed."; **New Mexico** – 15 NMAC 2.4.8 G(6): "A claimed horse shall not race elsewhere, except within state, or out of state stake races for a period of thirty days (30) or the end of the meet, whichever occurs first."; **New York** – 9 NYCRR 4038.4: "A claimed horse shall not race outside New York State for a period of 30 days from the date of the claim or the end of the meeting at which it was claimed, whichever period of time is longer, ..."; **North Dakota** – NDAC 69.5-01-07-17 (5)(b): "The [claimed] horse is required to continue to race at the track where claimed for a period of thirty days or the balance of the current race meeting whichever comes first."; **Ohio** – Ohio Adm.Code 3769-6-15: "No thoroughbred horse claimed in Ohio may be raced in another state, except in a stake race, for a period of sixty days."; **Oklahoma** – OHRC Rule 325:30-1-17: "A horse claimed out of a claiming race shall be eligible to race at any racing organization within the State of Oklahoma immediately or any state thirty (30) days after being claimed or the end of the race meeting where the claim occurred, whichever is sooner ..."; **Pennsylvania** – 58 Pa. Code § 163.255: "If a horse is claimed, it may not be sold or transferred to anyone wholly or in part, except in a claiming race, ... nor may it race elsewhere until after the close of the meeting at which it was claimed."; **Texas** – 16 Tex. Admin. Code § 313.308: "A horse claimed in a claiming race in Texas: ... (2) is ineligible to start in a race at a race meeting other than the one at which it was claimed until the end of the race meeting at which the horse was claimed."; **Virginia** – 11 VAC § 10-120-80: "... the [claimed] horse may not race elsewhere until after the close of the meeting at which it was claimed, ..."; **West Virginia** – W. Va. CSR 178-1-38.5: "... nor shall [the claimed horse] race outside of the state of West Virginia for a period of sixty (60) days, ..."; **Wyoming** – Wyoming Conduct of Racing Rules, Chapter 8, Section 22(d): "Any horse claimed shall not be sold or transferred wholly or in part to anyone for thirty (30) days except in another claiming race. The horse shall not remain in the same barn or under the control or management of its former owner or trainer for a like period unless reclaimed. It shall not race elsewhere until after the close of the meeting at which it was claimed..."

Jamgotchian argues that the three-part analysis unequivocally set forth in Davis is instead a "two-tiered" analysis by incorrectly asserting that whether or not the Regulation is part of a traditional government function is not a "valid determinative factor" in whether a law violates the Commerce Clause. Appellant Brief at 6, 9. Jamgotchian premises this inaccurate contention on a Supreme Court decision from 1985 and a law review article. Id. Neither can overcome the unmistakable language in Davis, however: "***government function is not susceptible to standard dormant Commerce Clause scrutiny*** owing to its likely motivation by legitimate objectives." Davis 553 U.S. at 341 (emphasis added). Moreover, the "emphasis on the public character" of the law is part of a "***fundamental element*** of dormant Commerce Clause jurisprudence." Id. at 342 (emphasis added). The traditional government function analysis has been cited in subsequent Supreme Court cases. See McBurney, 133 S. Ct. at 1720. Federal courts have also interpreted Davis as reiterating that determining whether a law involves a traditional government function is important because such laws merit lesser Commerce Clause scrutiny. See, e.g., Sandlands C&D LLC v. Horry, 737 F.3d 45, 52-53 (4th Cir. 2013).

Jamgotchian claims that a footnote in Davis proves that whether a law involves a traditional government function is not a valid consideration. Appellant Brief at 6-7. The footnote, which addresses Justice Kennedy's disagreement with the holding in United Haulers, states that in determining whether the law involves a traditional government function, a court considers whether the law merely benefits "private interests," or pertains to a responsibility of the government. Davis 553 U.S. at 342. Thus, contrary to

Jamgotchian's misplaced interpretation, the footnote reaffirms the importance of the traditional government function inquiry.

Jamgotchian's purported "gravest concern" that the Franklin Circuit Court and the Court of Appeals "completely overlooked" whether the Regulation pertains to KHRC's fulfillment of its responsibilities or is designed to favor local private interests is flat out wrong. Appellant Brief at 7. Both the Franklin Circuit Court and Court of Appeals directly considered and addressed this question in detail. The Franklin Circuit Court concluded that the Regulation "is for the benefit of the public interest, in that [KHRC] in fulfilling its core governmental function of ensuring that horse racing maintains competitive fields that are necessary for a healthy racing industry. There is no particular economic benefit to any local private interest that overshadows the [Regulation's] public purpose." Vol. II, R. 261. The Court of Appeals also considered and rejected the notion that the Regulation is designed to favor in-state private interests: "The purpose and effect of the [Regulation] is not to give preference to any individual in-state private party, but to nurture and promote the market for race horses, and to ensure that the public as a whole will benefit from the stronger fields and more competitive races that will result." Opinion at 7. Jamgotchian seeks to circumvent these rulings by claiming that the Regulation benefits local race tracks; this, however, is not the correct paradigm because the Regulation applies not to race tracks but to ***licensed owners***, such as Jamgotchian. It is undisputed that the Regulation applies even-handedly to in-state and out-of-state licensees.

D. *The Regulation Is Not Discriminatory*

Because the Regulation involves a traditional government function, the next step in assessing its constitutionality is to consider whether it is discriminatory. To determine whether the Regulation is discriminatory, the Court compares "substantially similar entities" subject to the Regulation, which in this case are Kentucky resident licensees who claim thoroughbred horses in Kentucky races and out-of-state licensees, such as Jamgotchian, who claim thoroughbred horses in Kentucky races. Davis, 550 U.S. at 342. The Franklin Circuit Court correctly held that the Regulation "is not discriminatory on its face" because it "applies equally to Kentucky owners and owners from out-of-state" and "even-handedly applies to all horse owners who have bought a horse at a claiming race in Kentucky." Vol. II., R. 263. The Court of Appeals agreed, noting that the Franklin Circuit Court "correctly held" that the Regulation is not discriminatory because it "treats all private actors—both Kentucky resident licensees and out-of-state licensees—exactly the same." Opinion at 11.

Jamgotchian argues that the Regulation treats in-state and out-of-state economic actors differently by favoring in-state economic actors. Specifically, he argues that the Regulation discriminates against owners who wish to race outside Kentucky in favor of race tracks located in Kentucky. This is an incorrect paradigm, however, because these are not the "substantially similar entities" to which Davis, or United Haulers, refers. The challenged law in United Haulers is particularly instructive on this point. In United Haulers, the issue was whether two counties' ordinances, which required waste haulers to bring waste to a state-owned-and-operated facility, violated the Commerce Clause. United Haulers, 550 U.S. at 334. After finding that the regulation of waste disposal is a

traditional government function, the court determined that the ordinances were not discriminatory because, even though the ordinances benefit certain disposal facilities to the exclusion of others, the ordinances treat both in-state and out-of-state private companies exactly the same. Id. at 342. The court did not focus on the wishes of the private actors subject to the law, but instead focused on how the law affected in-state and out-of-state actors subject to the law. Similarly, in Davis, the Supreme Court recognized that Kentucky's tax scheme benefitted Kentucky as an issuer of bonds, yet Kentucky's tax law treated all private issuers of bonds exactly the same. 553 U.S. at 342-43. Consequently, the court in Davis found Kentucky's tax law to be nondiscriminatory. Id. at 343.

The Regulation seeks to prevent the uncontrolled transfer of thoroughbred horses outside of Kentucky to ensure that a sufficient number of horses are available to race in the Commonwealth. This has been recognized not to discriminate against interstate commerce in analogous situations. See generally Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 955-56 (1982) (holding that a state that imposes water use restrictions in the event of a shortage does not discriminate against interstate commerce by seeking to prevent the uncontrolled transfer of water out of the state). To effectuate this, the Regulation treats all private actors – both Kentucky resident licensees and out-of-state licensees – ***exactly the same***. All owners purchasing horses in claiming races on the day Jamgotchian did, regardless of whether they were a Kentucky resident or not, were treated the same under the Regulation. The Franklin Circuit Court agreed, holding that the "purpose and effect of the regulation in question is not to give preference to any

individual in-state private party..." Vol. II., R. 260. As such, pursuant to United Haulers and Davis, the Regulation is not discriminatory.[8]

E. *The Regulation's Burden on Interstate Commerce Is Incidental and Does Not Clearly Exceed the Regulation's Local Benefits*

The third and final consideration in assessing whether the Regulation violates the Commerce Clause is whether the burden on interstate commerce is clearly excessive in relation to the Regulation's putative local benefits. Davis, 553 U.S. at 338-39, United Haulers, 550 U.S. at 346. This analysis was first set forth in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). While Davis observes that "[s]tate laws frequently survive this Pike scrutiny," 553 U.S. at 338-39, the court elected not even to perform the third step of the framework, finding that "the current record and scholarly material convince us that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary ... to satisfy a Pike burden in this particular case." 553 U.S. at 353. To the extent this Court finds that this factor should even be applied, this case is no exception.

Jamgotchian cannot establish that the Regulation's impact on interstate commerce is anything more than incidental, especially with respect to the specific facts of this case. Because KHRC did not (1) request that either Pennsylvania race track enforce or honor the Regulation against Jamgotchian or (2) request that either race track deny entry to Rochitta because of the Regulation, the Regulation had ***no impact whatsoever*** on interstate commerce in this case. The Franklin Circuit Court noted that "the burden on interstate commerce is unclear from the record in this case" and is thus "rather minor and

[8] Because the Regulation is not discriminatory, Jamgotchian's argument that the KHRC must demonstrate a legitimate interest that cannot be accomplished by any alternative nondiscriminatory means is inapplicable to the Court's evaluation of the Regulation.

somewhat speculative," while noting that Jamgotchian did not suggest even one potential alternative to the Regulation. Vol. II, R. 264, 265. The Court of Appeals approvingly summarized the Franklin Circuit Court's findings; going on to note that "even if Jamgotchian could demonstrate the Regulation had an impact on interstate commerce, the impact is certainly not more than incidental." Opinion at 11-12.

The Court of Appeals was correct, for several reasons. First, the Regulation does not prohibit outright the transfer or sale of thoroughbred horses outside of Kentucky because it only applies to a narrow set of circumstances. In order for the Regulation to apply, a person must voluntarily apply for and become a licensee and then must voluntarily elect to purchase a thoroughbred horse in a claiming race in Kentucky. An individual, including a licensee, is free to purchase a thoroughbred horse privately, outside of a claiming race, and in that circumstance is not subject to the Regulation. A licensed individual such as Jamgotchian, who chooses to purchase a thoroughbred racing horse in Kentucky, however, agrees to be bound by the Regulation for the privilege of participating in horse racing in this state. See KRS 230.290(2). In Kentucky, "the participation in any way in horse racing... is a privilege and not a personal right." KRS 230.215(1). Jamgotchian unilaterally chose to purchase a horse in a claiming race rather than purchase the horse privately; his elective action does not constitute an excessive burden on interstate commerce. The Franklin Circuit Court stated that Jamgotchian "seeks to obtain the benefits of the claiming race regulation" and that because he is a buyer he must "abide by the reasonable restrictions that are designed to promote the health of the horse racing industry as a whole," which necessarily includes the Regulation. Vol. II, R. 265.

Second, the Regulation's impact on interstate commerce, if any, is of limited duration and scope. With respect to Rochitta, Jamgotchian purchased the horse on May 21, 2011, and the Regulation prevented him from racing at another meet until July 1, 2011 – meaning he was potentially impacted for 42 days (even though Rochitta was accepted for entry in multiple races in Pennsylvania). Vol. I, R. 127-28. In fact, even if an individual purchased a horse on the first day of the longest race meet in Kentucky, under the Regulation the individual would be impacted for approximately ***three months***. Id. at 128. The Franklin Circuit Court found this important, stating that the "relatively short duration of this restriction militates strongly in favor of upholding it [the Regulation] as a reasonable exercise of the state's police power..." in regulating horse racing. Vol. II., R. 262. The Court of Appeals affirmatively agreed with this finding. See Opinion at 13.

Third, the vast majority of states that permit wagering on horse racing – 27 out of 38 states – have enacted laws similar to the Regulation. If nearly every other horse racing jurisdiction has a similar rule, the alleged impact on interstate commerce must be inconsequential.

In contrast to the at-best speculative impacts to interstate commerce are the Regulation's numerous local benefits. The Regulation benefits the Commonwealth by preventing the uncontrolled transfer of thoroughbred horses out of Kentucky in order to ensure larger fields of horses. Vol. I, R. 128. The Franklin Circuit Court's Order aptly noted that the Regulation permits KHRC to accomplish "its core governmental function of ensuring that horse racing maintains ***competitive fields that are necessary for a healthy racing industry***." Vol. II, R. 261 (emphasis added). Absent the Regulation,

horses could immediately be removed from a race meet, leading to fewer horses, fewer races and lower purses, which would greatly harm our signature industry.

A second benefit is that the purchases of horses in claiming races generate revenue through sales taxes on the claimed horses. Vol. I, R. 128. Jamgotchian, for example, paid $2,400 in sales tax to the Commonwealth for the purchase of Rochitta. Id. at 108. It is undisputed that the generation of tax revenues benefits the Commonwealth.

Third, as noted by the Court of Appeals, by ensuring there are a sufficient number of horses to fill races, the Regulation consequently promotes economic development in Kentucky, as did the tax law in Davis. Id. at 128; Opinion at 14. Larger fields resulting from the Regulation generate more revenue at Kentucky race tracks, including entry fee revenues; the take out on pari-mutuel handle[9] will be higher because more revenue is wagered on larger fields; miscellaneous revenue from refreshments, meals, programs, and the like will be higher because attendance is higher when larger fields compete. Id. at 128-29. Cumulatively, this leads to higher purses for owners, including Jamgotchian, which in turn translates to additional revenues for farm wages, equipment, and other improvements. Id. at 129. Additionally, because larger fields result in larger pari-mutuel handles, the Kentucky excise tax on pari-mutuel handles will produce even more revenue for the Commonwealth. Id.; See KRS 138.510. All of these benefits will likewise benefit the tourism associated with Kentucky's signature industry. Vol. I, R. 129.

Another benefit to Kentucky is that the Regulation assists in classifying horses correctly and promotes the equine industry by keeping better bred horses in Kentucky, for at least a period of time. See Jacobson v. Maryland Racing Comm'n, 274 A.2d 102 (Md.

[9] The take out is the portion of the pari-mutuel handle retained by the track, which includes excise taxes to be paid to the Commonwealth. The pari-mutuel handle is the total amount wagered on races.

Ct. App. 1971) (upholding the enforcement of Maryland's claiming regulation). Relatedly, trainers would likely not race their horses in Kentucky if they did not have the opportunity to re-claim them, which would be thwarted if licensees could take claimed horses out of Kentucky prior to the end of the claiming meet. Vol. I, R. 128.

The Kentucky Supreme Court has held that "[i]n determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when conferring upon Congress the regulation of commerce, never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." Walker v. Commonwealth, 127 S.W.3d 596, 602 (Ky. 2004) (quoting Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443-44 (1960) (quotations and citations omitted)). Jamgotchian, however, believes this is precisely what the dormant Commerce Clause is intended to do - to render unconstitutional KHRC's exercise of its police power. The Franklin Circuit Court expressly refused to do so, holding that because the Regulation "is part of a comprehensive regulatory program that is designed to promote the public purpose of fostering a racing industry that is a vital part of the economy of this state," "***this Court will not strike down a valid exercise of the police power as a violation of the dormant Commerce Clause*** absent a strong showing of detrimental impact on interstate commerce. No such showing has been made here." Vol. II, R. 261 (emphasis added).

F. *The Extraterritoriality Doctrine Does Not Apply to the Regulation*

Jamgotchian also claims the Regulation violates the extraterritoriality doctrine of the Commerce Clause. This argument must be rejected because the "dormant"

Commerce Clause analysis set forth in United Haulers and Davis has supplanted the "extraterritoriality doctrine," which is no longer relied upon by the Supreme Court. While conceding that "some Circuits have questioned the doctrine," Jamgotchian's only rebuttal is to note that the Sixth Circuit recently applied the doctrine to invalidate a statute. Appellant Brief at 18, n. 6. The case to which Jamgotchian refers, American Beverage Association v. Snyder, 700 F.3d 796, 807 (6th Cir. 2012), further proves that the extraterritoriality doctrine is of no relevance to this dispute by plainly stating that the "Supreme Court has applied the extraterritoriality doctrine ***only in the limited context of price-affirmation statutes***. These statutes force regulated entities to certify that the in-state price they charge for a good is no higher than the price they charge out-of-state." (emphasis added). The Regulation has nothing to do with pricing whatsoever; to the extent the extraterritoriality doctrine remains viable, its application is limited to this narrow area.

Even if the extraterritoriality doctrine did apply (which it does not), the Regulation does not run afoul of it. KHRC does not use the Regulation to control wholly extraterritorial commercial activity or to serve economic protectionism. Rather, under the appropriate "dormant" Commerce Clause analysis set forth in United Haulers and Davis, the Regulation is an exercise of Kentucky's police power that concerns a traditional government function. The Regulation does not discriminate against out-of-state economic interests but treats all private actors evenhandedly. What is more, the incidental burden on interstate commerce caused by the Regulation, if any, does not clearly outweigh the Regulation's local benefits.

II. There Is No Case or Controversy to Resolve.[10]

It is fundamental that a court must have jurisdiction before it has authority to decide a case. Wilson v. Russell, 162 S.W.3d 911, 913 (Ky. 2005). If no case or controversy exists, the court lacks jurisdiction. Commonwealth v. Maricle, 15 S.W.3d 376 (Ky. 2000). In determining whether a case or controversy exists, a "court will not decide speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy." Veith v. City of Louisville, 355 S.W.2d 295, 297 (Ky. 1962). No case or controversy exists if no party "represent[s] interests adverse" to those of the appellant. Sellin v. Education Professional Standards Board, 2013 Ky. App. Unpub. LEXIS 317, *7 (Ky. App. 2013).[11] In affirming the trial court's dismissal, the court noted that the "potential for future action" is insufficient and that the appellant was asking the "court to make a finding regarding speculative rights under speculative circumstances." Id. This Court does not have jurisdiction over Jamgotchian's declaratory judgment claim because there is no case or controversy.

Jamgotchian asks this Court to make a finding regarding speculative rights under speculative circumstances. KHRC (1) never charged Jamgotchian with violating the Regulation; (2) never encouraged anyone from Penn National to refuse entry to Rochitta;

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[10] In his brief, Jamgotchian asserts this issue is "ostensibly" not before the Court because "KHRC has not attacked the Court of Appeals' resolution of this issue." Appellant Brief at 5-6. Because the Court of Appeals affirmed the Franklin Circuit Court's grant of summary judgment in favor of KHRC, KHRC could not have filed a motion for discretionary review before this Court. See Fischer v. Fischer, 348 S.W.3d 582, 592 (Ky. 2011), holding that a motion for discretionary review is not required because "this Court reverses or affirms *judgments* rather than *issues*, then if a judgment has been affirmed, there is obviously no logical reason for the prevailing party to appeal, regardless of the ground or grounds upon which affirmance occurs." (emphasis in original).

[11] In accordance with CR 76.28(4)(c), this decision is designated unpublished and a copy is provided in the Appendix. Because of its recent issuance, no other decision adequately addresses the issue.

and (3) never encouraged anyone from Presque Isle to refuse entry to Rochitta. To the extent that Jamgotchian believes he was wrongfully deprived of opportunities to race in Pennsylvania, he should have brought suit against those entities. Simply because Jamgotchian believes the Regulation is unconstitutional and KHRC believes the Regulation is constitutional does not mean there is an actual case or controversy. It is well established that "[a] mere difference of opinion is not an actual controversy...." Jefferson County v. Chilton, 33 S.W.2d 601, 605 (Ky. App. 1930) (citations omitted). Jamgotchian is asking this Court to issue an advisory opinion, which is prohibited. Bowling v. Com., 377 S.W.3d 529, 540 (Ky. 2012).

CONCLUSION

KHRC respectfully requests the Kentucky Supreme Court to affirm the Franklin Circuit Court's Order and the Court of Appeals' Opinion and to hold that Jamgotchian's claims are not justiciable and that the Regulation does not violate the dormant Commerce Clause of the United States Constitution.

Respectfully submitted,

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